

SENATE BILL NO. 112

INTRODUCED BY HARRINGTON

BY REQUEST OF THE DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES

A BILL FOR AN ACT ENTITLED: "AN ACT REVISING THE POWERS OF A GUARDIAN; AUTHORIZING A FULL GUARDIAN TO PETITION FOR A DISSOLUTION OF MARRIAGE OR A LEGAL SEPARATION ON BEHALF OF THE WARD UNDER LIMITED CONDITIONS; REQUIRING A DISTRICT COURT TO HOLD A HEARING TO DETERMINE WHETHER A DISSOLUTION OF MARRIAGE IS ~~IN~~ CONSISTENT WITH THE WARD'S BEST-INTEREST SUBSTITUTED JUDGMENT; AND AMENDING ~~SECTION~~ SECTIONS 72-5-101 AND 72-5-321, MCA."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

SECTION 1. SECTION 72-5-101, MCA, IS AMENDED TO READ:

"72-5-101. Definitions. Unless otherwise apparent from the context, in this code, the following definitions apply:

(1) "Incapacitated person" means any person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or other cause, ~~(except minority)~~, to the extent that ~~he~~ the person lacks sufficient understanding or capacity to make or communicate responsible decisions concerning ~~his~~ the person or which cause has so impaired the person's judgment that ~~he~~ the person is incapable of realizing and making a rational decision with respect to ~~his~~ the person's need for treatment.

(2) "Protected person" means a minor or other person for whom a conservator has been appointed or other protective order has been made.

(3) "Protective proceeding" means a proceeding under the provisions of 72-5-409 to determine that a person cannot effectively manage or apply ~~his~~ the person's estate to necessary ends, either because ~~he~~ the person lacks the ability or is otherwise inconvenienced or because ~~he~~ the person is a minor, and to secure administration of ~~his~~ the person's estate by a conservator or other appropriate relief.

(4) "Substituted judgment" means the judgment that an incapacitated person would make if restored to capacity based upon:

1 (a) the person's present preference or, if the person is incapable of indicating a preference, the person's
2 prior expressed interest;

3 (b) the person's personal, moral, and religious convictions;

4 (c) the person's relationship with family members;

5 (d) the consequences if the proposed action is not taken;

6 (e) the consequences if the proposed action is taken; and

7 (f) other relevant factors.

8 ~~(4)~~(5) "Ward" means a person for whom a guardian has been appointed. A "minor ward" is a minor for
9 whom a guardian has been appointed solely because of minority."
10

11 **Section 2.** Section 72-5-321, MCA, is amended to read:

12 **"72-5-321. Powers and duties of guardian of incapacitated person.** (1) The powers and duties of
13 a limited guardian are those specified in the order appointing the guardian. The limited guardian is required to
14 report the condition of the incapacitated person and of the estate that has been subject to the guardian's
15 possession and control, as required by the court or by court rule.

16 (2) ~~A~~ Subject to subsection (2)(g), a full guardian of an incapacitated person has the same powers,
17 rights, and duties respecting the ward that a parent has respecting an unemancipated minor child, except that
18 a guardian is not liable to third persons for acts of the ward solely by reason of the parental relationship. In
19 particular and without qualifying the foregoing, a full guardian has the following powers and duties, except as
20 limited by order of the court:

21 (a) To the extent that it is consistent with the terms of any order by a court of competent jurisdiction
22 relating to detention or commitment of the ward, the full guardian is entitled to custody of the person of the ward
23 and may establish the ward's place of residence within or outside of this state.

24 (b) If entitled to custody of the ward, the full guardian shall make provision for the care, comfort, and
25 maintenance of the ward and whenever appropriate arrange for the ward's training and education. Without
26 regard to custodial rights of the ward's person, the full guardian shall take reasonable care of the ward's clothing,
27 furniture, vehicles, and other personal effects and commence protective proceedings if other property of the ward
28 is in need of protection.

29 (c) A full guardian may give any consents or approvals that may be necessary to enable the ward to
30 receive medical or other professional care, counsel, treatment, or service.

(d) If a conservator for the estate of the ward has not been appointed, a full guardian may:

(i) institute proceedings to compel any person under a duty to support the ward or to pay sums for the welfare of the ward to perform that person's duty;

(ii) receive money and tangible property deliverable to the ward and apply the money and property for support, care, and education of the ward. However, the full guardian may not use funds from the ward's estate for room and board that the full guardian, or the full guardian's spouse, parent, or child has furnished the ward unless a charge for the service is approved by order of the court made upon notice to at least one of the next of kin of the incompetent ward, if notice is possible. The full guardian ~~must~~ shall exercise care to conserve any excess for the ward's needs.

(e) Unless waived by the court, a full guardian is required to annually report the condition of the ward and of the estate ~~which~~ that has been subject to the full guardian's possession or control ~~annually~~ for the preceding year. A copy of the report must be served upon the ward's parent, child, or sibling if that person has made an effective request under 72-5-318.

(f) If a conservator has been appointed, all of the ward's estate received by the full guardian in excess of those funds expended to meet current expenses for support, care, and education of the ward must be paid to the conservator for management as provided in this chapter, and the full guardian ~~must~~ shall account to the conservator for funds expended.

(g) ~~A~~ IF THE FULL GUARDIAN ALLEGES THAT A WARD IS OR IF THE WARD HAS BEEN DETERMINED TO BE A VICTIM OF ABUSE, NEGLECT, OR FINANCIAL EXPLOITATION BY A SPOUSE AND THE WARD, THROUGH A FULL GUARDIAN, IS SEEKING PUBLIC ASSISTANCE, THEN THE full guardian may petition the district court for a dissolution of marriage or a legal separation on the ward's behalf. The district court judge shall hold a hearing to determine if a dissolution of marriage or a legal separation is in CONSISTENT WITH the ward's ~~best interest~~ SUBSTITUTED JUDGMENT. If the judge determines, BY CLEAR AND CONVINCING EVIDENCE, that a dissolution of marriage or a legal separation is in CONSISTENT WITH the ward's ~~best interest~~ SUBSTITUTED JUDGMENT, then the guardian may proceed with the dissolution of marriage or a legal separation on behalf of the ward.

(3) Upon failure, as determined by the clerk of court, of the guardian to file an annual report, the court shall order the guardian to file the report and give good cause for the guardian's failure to file a timely report.

(4) Any full guardian of one for whom a conservator also has been appointed shall control the custody and care of the ward. A limited guardian of a person for whom a conservator has been appointed shall control those aspects of the custody and care of the ward over which the limited guardian is given authority by the order

1 establishing the limited guardianship. The full guardian or limited guardian is entitled to receive reasonable sums
2 for the guardian's services and for room and board furnished to the ward as agreed upon between the guardian
3 and the conservator, ~~provided~~ if the amounts agreed upon are reasonable under the circumstances. The full
4 guardian or limited guardian authorized to oversee the incapacitated person's care may request the conservator
5 to expend the ward's estate by payment to third persons or institutions for the ward's care and maintenance.

6 (5) A full guardian or limited guardian may not involuntarily commit for mental health treatment or for
7 treatment of a developmental disability or for observation or evaluation a ward who is unwilling or unable to give
8 informed consent to commitment, except as provided in 72-5-322, unless the procedures for involuntary
9 commitment set forth in Title 53, chapters 20 and 21, are followed. This chapter does not abrogate any of the
10 rights of mentally disabled persons provided for in Title 53, chapters 20 and 21.

11 (6) Upon the death of a full guardian's or limited guardian's ward, the full guardian or limited guardian,
12 upon an order of the court and if there is no personal representative authorized to do so, may make necessary
13 arrangements for the removal, transportation, and final disposition of the ward's physical remains, including
14 burial, entombment, or cremation, and for the receipt and disposition of the ward's clothing, furniture, and other
15 personal effects that may be in the possession of the person in charge of the ward's care, comfort, and
16 maintenance at the time of the ward's death."

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